Supreme Court, U.S.
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No. 00-1383

In The

Supreme Court of the United States

ROBIN AMARO BRUNGART,

Petitioner,

v.

BELLSOUTH TELECOMMUNICATIONS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The first question presented as stated by Petitioner is incorrect in a material respect. The Eleventh Circuit Court of Appeals did not hold that temporal proximity was not admissible evidence. Rather, the Eleventh Circuit held that where the record evidence establishes as an undisputed fact that the decisionmaker had no knowledge that Petitioner had engaged in a protected activity under the Family and Medical Leave Act ("FMLA"), temporal proximity alone is insufficient to create a genuine issue of fact as to a causal connection between the termination of employment and the taking of FMLA leave.

The second and fourth questions are intertwined, and are not addressed separately in Petitioner's petition. The sole issue, decided consistently by the two Courts of Appeal addressing the issue, is whether 29 C.F.R. § 825.110(d) is a valid regulation. Both appellate courts appropriately held that it is not.

The third question presented also inaccurately reflects the record. The District Court, as affirmed by the Eleventh Circuit Court of Appeals, held that Petitioner failed to either demonstrate a specific notice provision under FMLA which had been violated or demonstrate that a private cause of action existed under such notice provisions. As such, it was a *factual* issue (the lack of evidence) rather than a legal issue which required dismissal of Petitioner's notice claim filed under the FMLA.

PARTIES

The parent corporation of Respondent BellSouth Telecommunications, Inc. is BellSouth Corporation, a publicly traded company.

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STATEMENT OF THE CASE

The statement of the case submitted by Petitioner omitted or misstated the following material facts:

The record evidence established that Petitioner's supervisor *did* respond to her FMLA leave request. As reflected in the District Court's opinion, immediately upon Petitioner's request for FMLA leave, "Ms. Thompson and Ms. Cardin gave Ms. Brungart the telephone number of the FMLA administrator. Ms. Brungart called the FMLA administrator, who faxed Ms. Brungart an application which she filled out and submitted that day." (App. 23.)

The undisputed record evidence also established, as reflected by the District Court, that the manager who decided to terminate Petitioner's employment had no knowledge that she was scheduled to take FMLA leave. "Mr. Nelson did not know at the time that he fired Ms. Brungart that she was scheduled to take FMLA leave the next day." (App. 26.) Mr. Nelson provided a legitimate business reason for the termination of Petitioner's employment which was totally unrelated to FMLA leave – her consistent failure to adhere to her schedule. (*Id.*)

REASONS FOR DENYING THE PETITION

I. The Issues Decided By The Court Of Appeals Are Well-Settled And/Or Supported By The Undisputed Evidence, And Therefore Fail To Raise An Issue Of Importance For This Court.

The inaccurate statement of questions presented notwithstanding, the *actual* issues decided by the Eleventh

Circuit were clear cut and unremarkable. The Court of Appeals based its decision on well-established law. Petitioner has failed to even allege that the Court of Appeals' decision is inconsistent with, or contrary to, any authority of either this Court or another Court of Appeals. As such, Petitioner has failed to raise an issue appropriate for certiorari.

A. It Is Well-Settled Under Federal Employment Law That Summary Judgment On A Retaliation Claim Is Appropriate Where The Decisionmaker Had No Knowledge Of The Employee's Protected Activity.

Petitioner asserts that this Court should address the issue whether temporal proximity between a protected activity (FMLA leave) and an adverse employment action (here, termination of employment) *requires* the District Court to hold that plaintiff has met a prima facie case under the FMLA, regardless of other evidence. Petitioner supports such assertion with *no* case law. Petitioner presents no conflict among the Courts of Appeal.

The record evidence establishes the undisputed fact that Mr. Calvin Nelson, the manager who terminated the employment of Petitioner, had absolutely no knowledge that Petitioner had engaged in a protected activity under the FMLA. Petitioner does not dispute this fact. The Eleventh Circuit appropriately held, relying on numerous prior decisions, that an employer cannot intentionally interfere with FMLA leave where the employer's decisionmaker had no knowledge of such leave. (App. 15-17.) This is a well-established point of law. *See Clover v. Total*

Sys. Servs., Inc., 176 F.3d 1346, 1354 (11th Cir. 1999); *Raney v. Vinson Guard Serv., Inc.*, 120 F.3d 1192, 1197 (11th Cir. 1997); *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1163 (11th Cir. 1993); *Hudson v. Southern Ductile Casting Corp.*, 849 F.2d 1372, 1376 (11th Cir. 1988); *McCollum v. Bolger*, 794 F.2d 602, 610-11 (11th Cir. 1986).

Employment laws require that the adverse action be *intentional* retaliation. Knowledge that the employee was in a protected category is essential to intentionally retaliate based on that category. The Eleventh Circuit and other courts have held that the undisputed lack of such knowledge prevents a plaintiff from establishing a claim. Petitioner has not cited a single case conflicting with the Eleventh Circuit authority. As such, no issue appropriate for certiorari exists.

B. The Two Courts Of Appeal Addressing The Validity Of 29 C.F.R. § 825.110(d) Both Have Held That The Regulation Is Invalid Under This Court's *Chevron* Test.

Petitioner also requests a writ of certiorari to examine the Eleventh Circuit Court of Appeals' holding that 29 C.F.R. § 825.110(d) is an invalid regulation promulgated by the Department of Labor ("DOL"). Such regulation is patently contrary to and in direct conflict with the explicit terms of the FMLA, an Act passed by Congress. Both Courts of Appeal addressing the issue have ruled that the regulation is invalid. Moreover, including the District Court herein, six out of seven district court decisions (of which Respondent is aware) analyzing the validity of such regulation have correctly held that such

regulation is invalid. Given these consistent and appropriate holdings, no writ of certiorari should issue.

Under the express language of the statute passed by Congress, an employee is not covered by the FMLA and eligible for FMLA leave unless he or she has worked 1,250 hours during the previous twelve month period. 29 U.S.C. § 2611(2)(A)(ii) ("[T]he term 'eligible employee' means an employee who has been employed . . . for at least 1,250 hours of service with such employer during the previous 12-month period.")

29 C.F.R. § 825.110(d), implemented by the DOL, states that if an employer does not notify an employee of the denial of a request for FMLA leave within 48 hours of the request, the employer is estopped from denying such leave. 29 C.F.R. § 825.110(d). Because such regulation is directly contrary to the express eligibility requirements passed by Congress, the District Court appropriately ruled that the regulation was invalid.

Affirming the District Court's ruling on such issue, the Court of Appeals agreed with such reasoning. The Court of Appeals noted that while Congress expressly stated in the FMLA that an employee must have 1,250 hours of work within the previous twelve month period in order to be eligible, 29 C.F.R. § 825.110(d) essentially makes employees without such requirement eligible where their employer failed to notify them of their ineligibility within 48 hours of the request for FMLA leave. In its ruling, the Court of Appeals expressly relied on this Court's opinion in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104

S. Ct. 2778, 2781-82 (1984). The Eleventh Circuit Court of Appeals noted:

> To put it in *Chevron* terms, "Congress has directly spoken to the precise question at issue," which is eligibility for the medical leave rights created in the statute, and because "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 2781-82 (1984).

(App. 10.)

Applying the *Chevron* test[1] to 29 C.F.R. § 825.110(d), the Eleventh Circuit Court of Appeals noted:

> There is no ambiguity in the statute concerning eligibility for family medical leave, no gap to be filled. Instead, the Department of Labor in this regulation has attempted to pry apart the clear words of the act in order to create a gap into which it can wedge its policy preference. We understand the Department's motive, which is to further the goals of the act by forcing employers to respond to leave requests within a reasonable period of time. But when an administrative agency seeks to improve legislation by altering the basic coverage provisions that Congress has written into the law, it has gone too far.

(App. 10-11.)

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[1] Under this Court's *Chevron* test, a court must determine (1) whether Congress has directly spoken to the question at issue and (2) whether the regulation is "arbitrary, capricious, or manifestly contrary" to the original law passed by Congress. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 841-44 (1984).

No Court of Appeals has issued a contrary ruling. Moreover, the Eleventh Circuit does not stand alone. In its opinion, the Eleventh Circuit relied on the prior decision of the *Seventh* Circuit Court of Appeals invalidating this same regulation. In doing so, the Seventh Circuit held: "This statutory text is perfectly clear and covers the issue. The right of FMLA leave is conferred only on employees who have worked at least 1,250 hours in the previous twelve months." *Dormeyer v. Comerica Bank-Illinois*, 223 F.3d 579, 582 (7th Cir. 2000).

The first district court to appropriately invalidate this regulation summarized the issue succinctly:

> Congress clearly stated that employees must work for twelve months and 1250 hours to achieve eligibility under the FMLA. Congress left no explicit or implicit gap for the regulations to fill, and employees should only receive the protections of the FMLA if they have worked for twelve months and the requisite amount of time. . . . Any regulatory exceptions which purport to shorten the twelve-month eligibility period are impermissible creations of the Department of Labor.

Wolke v. Dreadnought Marine, Inc., 954 F. Supp. 1133, 1136-37 (E.D. Va. 1997) (holding that 29 C.F.R. § 825.110(d) is blatantly unconstitutional and invalid, that an employee who had not worked 1,250 hours is not eligible, and dismissing claims of estoppel despite late notice by employer). In applying the *Chevron* test, the *Wolke* Court noted that 29 C.F.R. § 825.110(d) purports to transform employees who are ineligible under the FMLA statute into eligible employees. *Id.* The *Wolke* Court noted that under the regulation, an employee could work for

one day, inform her new employer that she was sick, and if the employer failed to notify her of her ineligibility within two days, she would then be deemed eligible in direct contradiction of the eligibility requirements passed by Congress. *Id.* Citing *Chevron*'s mandate that "[c]ourts are the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear Congressional intent," the *Wolke* Court appropriately declared the regulation invalid. *Id.* at 1137.

In addition to the District Court here, at least four other district courts (for a total of six) have agreed with *Wolke* and struck down 29 C.F.R. § 825.110. *See McQuain v. Ebner Furnaces, Inc.*, 55 F. Supp. 2d 763 (N.D. Ohio 1999); *Dormeyer v. Comerica Bank-Illinois*, No. 96C4805, 1998 U.S. Dist. LEXIS 16585 at *15 (N.D. Ill. October 14, 1998), *aff'd*, 223 F.3d 579 (7th Cir. 2000); *Fisher v. State Farm Mut. Auto. Ins. Co.*, 999 F. Supp. 866 (E.D. Tex. 1998), *aff'd without op.*, 176 F.3d 479 (5th Cir. 1999); *Seaman v. Downtown Partnership*, 991 F. Supp. 751, 754 (D. Md. 1998).

The only case upholding the regulation relies on a faulty analysis. *See Miller v. Defiance Metal Prods., Inc.*, 989 F. Supp. 945 (N.D. Ohio 1997).[2] The *Miller* Court incorrectly states that "the regulation does not attempt to redefine the statutory definition of eligible employee, it is the aspect of notice which the regulation addresses." *Id.* at 948. However, it is clear that the regulation involves *both* notice and eligibility. Had the regulation provided for a *monetary* penalty for failure to provide notice, such

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[2] As noted above, *McQuain*, one of the decisions disagreeing with *Miller*, is within the same federal district as *Miller*.

regulation may have been valid. However, as its penalty for failure to provide prompt notice, the DOL *alters the eligibility requirements* and requires an employer to deem an employee eligible, even if (as here) it is undisputed that the employee did not meet the eligibility requirements expressly provided for by Congress. The DOL's notice requirement might not be contrary to the statute. However, the relief provided patently is contrary.

The decision of the Court of Appeals invalidating this regulation was clearly appropriate. The Seventh Circuit Court of Appeals has ruled likewise. No conflict among the Courts of Appeal exists, and both opinions are consistent with this Court's *Chevron* test. No issue warranting a writ of certiorari exists, and this Court should deny certiorari.

C. No Legal Issue Regarding FMLA Leave Exists Because Petitioner Failed To Even Demonstrate The Violation Of Any Notice Requirement Under The FMLA.

Finally, Petitioner appeals the dismissal of her FMLA notice claim. The District Court correctly held that because no applicable notice provision had been violated, and no failure to provide notice constituted an interference with Petitioner's rights, Respondent was entitled to summary judgment.

At no time has Petitioner ever pointed to a specific notice provision under the FMLA which Respondent has violated. Petitioner's Amended Complaint does not specify a provision. Even Petitioner's appellate pleadings do not delineate a specific item of which she should have

been notified. Her brief names the same DOL regulation named in the proceedings below, 29 C.F.R. § 825.301(b-c). As the District Court correctly noted, however, the specific items listed in § 825.301 are wholly inapplicable. Such regulation requires notice regarding required medical certification, the right to substitute paid leave, health benefits during a FMLA leave, and other information that may have been relevant *had Petitioner been eligible* for FMLA leave. Such regulation does not require notification of the specific *eligibility* requirements. Since Petitioner never entered a FMLA leave, Respondent was not required to notify her of procedures under such a leave under 29 C.F.R. § 825.301. Moreover, Petitioner never demonstrated how not receiving information regarding such procedures affected her rights in any way.

Petitioner has never pointed to a specific notice provision with which Respondent did not comply, or which would have changed her actions or eligibility. It is undisputed that she was not eligible for FMLA benefits in December, 1996, the time period when she makes a vague allegation about notice requirements. No notice would have changed her ineligibility. Since Respondent has not violated a notice provision, and no failure to provide notice could have interfered with any FMLA or employment rights Petitioner may have had, the District Court correctly dismissed the FMLA notice claim. The Eleventh Circuit Court of Appeals correctly affirmed.[3]

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[3] As noted above, Petitioner was immediately provided forms and requirements for applying for FMLA leave, receiving the forms and submitting her application on the very day she asked for leave. (App. 23.)

Because Petitioner never identified a FMLA notice requirement which was violated by Respondent, the Eleventh Circuit Court of Appeals correctly affirmed dismissal of such claim. Petitioner's brief again fails to identify any applicable notice requirement. The opinions below do not conflict with the FMLA or any decision of this Court. Accordingly, no issue appropriate for certiorari exists.

CONCLUSION

The Court of Appeals properly held that because the decisionmaker had no knowledge of the protected activity, Petitioner's FMLA retaliation claim failed. The Court of Appeals also properly held that 29 C.F.R. § 825.110(d) is an invalid regulation which conflicts with an Act of Congress. The Seventh Circuit Court of Appeals likewise has held that the regulation is invalid. Finally, the record evidence fails to establish a violation of a FMLA notice requirement, and therefore no legal issue regarding FMLA notice has been presented to this Court. Respondent therefore respectfully requests that the petition be denied.

Respectfully submitted,

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